

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.401 OF 2007

IN

APPEAL FROM ORDER NO.276 OF 2007

Shri Anil Krishna Zunjurwad & Anr. ...Applicants
(Appellants in the
Appeal from Order)

Versus

Smt Indumati Harish Borse ...Respondent
(Respondent in the
Appeal from Order)

Shri A.G.Damle for the Applicants.

Ms Chandana Salgaonkar-Radia for the Respondent.

CORAM : ABHAY S.OKA, J.
DATED : AUGUST 09, 2007.

P.C.:

1. Heard the submissions of the learned counsel appearing for the parties. This Application is taken out by the Appellants-original Plaintiffs for interim relief pending the final disposal of the Appeal from Order. The challenge in the Appeal from Order is to the judgment and order dated 18th September, 2006 passed by the learned Civil Judge, Senior Division, Pune on application at Exhibit 5 in a suit filed by the Applicants. By the said order, the prayer made by the Applicants for the appointment of Court Commissioner and for appointment of Court Receiver was granted. However, the prayer for temporary injunction was not granted. In

so far as the order of appointment of the Court Receiver is concerned, the Respondent-original Defendant has preferred an Appeal from Order No.446 of 2006 for challenging the same. The said Appeal has been admitted by this Court and the order appointing the Court Receiver has been stayed. The said Appeal is still pending.

2. The Court Commissioner appointed under the impugned order has submitted a report of valuation in which he has stated that the total cost of the work carried out by the Applicants on the suit property is Rs.11,07,851/-. The Commissioner has further stated that the cost of the material lying at the site is Rs.1,37,078/-.

3. The Applicants-Plaintiffs have filed the suit or declaration, mandatory injunction and a money decree. The declaration prayed is that the termination of memorandum of understanding dated 30th November, 2004 executed by the Respondent in favour of the Applicants is illegal and void. According to the case of the Applicants, the Respondent by the said Memorandum of Understanding appointed them as the developers of the suit property held by her. The Applicant had paid total consideration of Rs.67,00,000/- to the Respondent.

According to the Applicants, they have taken several steps on the basis of the Memorandum and had commenced the construction. The Respondent purported to terminate the Memorandum of Understanding by notice dated 23rd June, 2006. Therefore, the Applicants filed the suit. The prayer in the Civil Application is for a temporary injunction restraining the Respondent from creating third party interests in respect of the suit property.

4. When this Application came up on board on 22nd June, 2007, the Respondent expressed readiness and willingness to deposit a sum of Rs.79,49,474/- in the trial Court within a period of three weeks from that date. The said amount constitutes a sum of Rs.67 lakhs received by the Respondent from the Appellants under the Memorandum of Understanding and a sum of Rs.12,44,474/- as quantified in valuation report of the Court Commissioner. According to the case of the Applicants they are entitled to temporary injunction restraining the Respondent from creating third party interests. In the reply to the Civil Application, the stand taken by the Respondent is that she has entered into a development agreement with M/s.Bothra and Surana Associates authorising them to develop the suit property and the said developers are carrying on the work of development. It is stated that an agreement in favour

of the said developers has been entered into on 26th August, 2006.

5. It is not in dispute that a sum of Rs.79,44,500/- has been deposited by the Respondent with the trial Court on 11th July, 2007. As stated earlier it is the case of the Respondent that a development agreement has been entered into by her in favour of a third party on 26th August, 2006. The Applicants are protected by the deposit of the aforesaid amount. If the Applicants so desire, they are at liberty to withdraw the said amount subject to furnishing adequate security for the said amount to the satisfaction of the trial Court. The order of appointment of the court receiver made by the trial Court at the instance of the Applicants has been stayed by this Court in the Appeal from Order filed by the Respondent.

6. It is a case of the Respondent that a third party is carrying on work of development. The third party has been already named in the reply of the Respondent. The third party is not a party to the proceedings. Therefore, no case is made out for grant of temporary injunction as prayed. It is however obvious that any further third party interests created by the Respondent herein will be subject to further

orders which may be passed in the Appeal as well as in the suit. In case the Respondent creates further third party interests, intimation thereof with all material particulars will have to be given by the Respondent to the Applicants.

7. Hence, Civil Application is disposed of by passing following order:

- (i) The prayer for temporary injunction is rejected.
- (ii) It will be open for the Applicants to withdraw the sum of Rs.79,44,500/- deposited by the Respondent in the trial Court on furnishing adequate security for the said amount to the satisfaction of the trial Court. The Respondent will be heard by the trial Court before accepting the security. It is obvious that if the amount is withdrawn by the Applicants, the withdrawal will be subject to final outcome of the suit and the same will be without prejudice to rights and contentions of both the parties.
- (iii) If the Applicants fail to furnish adequate security for the said amount within period of three months from today, the trial Court will

invest the said amount in fixed deposit in any nationalised bank. The fixed deposit shall be renewed from time to time till the disposal of the suit.

- (iv) If any further third party interests in respect of the suit property are created by the Respondent, the same will be naturally subject to further orders which may be passed in the Appeal and/or in suit. In case such third party interests are created, the Respondent will immediately give intimation thereof in writing to the Applicants with all the material particulars.
- (v) Pendency of this Appeal in this Court will not operate as stay of proceeding of the suit and trial Court is free to proceed with the final hearing of the suit.
- (vi) There will be no orders as to costs.

JUDGE